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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949~~. 1950

No. ~~710~~ 45

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., APPELLANTS, IN OPPOSITION TO MOTIONS TO AFFIRM FILED BY CERTAIN APPELLEES.

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TABLE OF CONTENTS.

	PAGE
Questions Presented	1
Preliminary Statement	3
Argument	5
I. Whether § 307(d) of the Interstate Commerce Act Is a Congressional Mandate for the Prescription of Differentials Between All-Rail and Barge-Rail Rates Regardless of Relative Cost of Service or Other Transportation Circumstances and Conditions Is a Question of Substance	5
II. Whether, Under the National Transportation Policy, the Commission May Refuse to Recognize Appellants' Inherent Advantage of Lower Cost of Service and Prescribe Differentials in Favor of Barge-Rail Service in Spite of Its Finding That There Are No Demonstrable Economies in Such Service to Justify the Differentials Is a Question of Substance	10
III. Whether the Commission May Deprive Appellants of Their Inherent Advantage of Superiority of Service by Establishing Differentials Based on the Inferiority of the Barge-Rail Service Is a Question of Substance	16
IV. Whether the Commission May Establish Joint Barge-Rail Rates Without a Finding That Such Rates Are Just and Reasonable Is a Question of Substance	19
V. Whether the Commission's Order Is Supported by Proper Findings Is a Question of Substance	21
VI. Whether the Commission's Order Is Supported by Substantial Evidence Is a Question of Substance	22
Conclusion	24
Appendix	25

CITATIONS.

Cases.

Ann Arbor R. Co. v. United States, 281 U. S. 658..... 8, 9
Atchison, T. & S. F. Ry. Co. v. United States, 284 U. S. 248 15
Baltimore & O. R. Co. v. United States, 22 F. Supp. 533..... 22
Chicago Junction Case, 264 U. S. 258..... 6, 23
Eastern-Central Ass'n v. United States, 321 U. S. 194..21, 22
Florida v. United States, 282 U. S. 194..... 22
Inland Waterways Corporation v. Alabama G. S. R. Co., 151 I. C. C. 126..... 12, 13
Interstate Commerce Commission v. Mechling, 330 U. S. 567 ..... 5, 10, 14
Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282..... 7, 8
Naval Stores From Mississippi to Gulf Ports, 235 I. C. C. 723..... 13
Petroleum and Petroleum Products, Calif. to Ariz., 241 I. C. C. 21..... 13
Rail and Barge Joint Rates, 270 I. C. C. 591..... ..... 5, 7, 8, 10, 11, 14, 20, 21
Rubber Products Between Southern and Ohio Points, 41 M. C. C. 93..... 17
Saginaw Broadcasting Co. v. Federal C. Com'n, 96 F. 2d 554 (certiorari denied 305 U. S. 613)..... 22
Securities Commission v. Chenery Corp., 318 U. S. 80.. 22
Tri-State Broadcasting Co. v. Federal C. Com'n, 96 F. 2d 564..... 22
United States v. Baltimore & O. R. Co., 293 U. S. 454.... 22
United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499..... 21
United States v. New York Central R. R., 263 U. S. 603 9

Statutes.

Inland Waterways Corporation Act, as amended by the Denison Act:
Sec. 3(c) [45 Stat. 979; 49 U. S. C. § 153(c)]...5, 7, 8, 25
Interstate Commerce Act, as amended:
National Transportation Policy [54 Stat. 899; preceding 49 U. S. C. § 1].....5, 8, 12, 16, 17, 25
Sec. 307(d) [54 Stat. 937; 49 U. S. C. § 907(d)]...
.....1, 3, 4, 5, 6, 9, 12, 23, 25
Sec. 307(f) [54 Stat. 938; 49 U. S. C. § 907(f)].... 18
Transportation Act of 1920:
Sec. 500 [41 Stat. 499; 49 U. S. C. § 142]..... 7
Transportation Act of 1940:
[54 Stat. 898].....3, 6, 17

Miscellaneous.

Congressional Record: Vol. 84, p. 9711..... 18

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QUESTIONS PRESENTED.

This appeal presents the following substantial questions:

1. Whether § 307(d) of the Interstate Commerce Act is a congressional mandate for the prescription of differentials between all-rail and barge-rail rates regardless of relative cost of service or other transportation circumstances and conditions.

2. Whether, under the national transportation policy, the Commission may refuse to recognize appellants' inherent advantage of lower cost of service and prescribe differentials in favor of barge-rail service in spite of its finding that there are no demonstrable economies in such service to justify the differentials.

3. Whether the Commission may deprive appellants of their inherent advantage of superiority of service by establishing differentials based on the inferiority of the barge-rail service.

4. Whether the Commission may establish joint barge-rail rates without a finding that such rates are just and reasonable.

5. Whether the Commission's order is supported by proper findings.

6. Whether the Commission's order is supported by substantial evidence.

PRELIMINARY STATEMENT.

That the questions presented by this appeal are substantial was not challenged by the Department of Justice, no motion to affirm having been filed on behalf of the United States. The motion filed by the Commission carefully avoids any statement that the questions involved are not substantial. The motion of the barge lines alleges that no substantial questions are presented by the appeal, but such an assertion is belied by the very length of the motion. The motions of the Commission and the barge lines are in reality briefs on the merits of the appeal and hardly seem to be within the spirit of Rule 7, paragraph 4, of this Court.

Neither motion to affirm denies the allegation in appellants' statement as to jurisdiction that this is the first time this Court has been called upon to construe § 307(d) of the Interstate Commerce Act with respect to the extent of the Commission's power to establish differentials between all-rail and barge-rail rates.

On September 18, 1940, during the pendency of this proceeding before the Commission, the Transportation Act of 1940, 54 Stat. 898, became effective. Among other things, Congress adopted a formal declaration of the national transportation policy and added to the Interstate Commerce Act, as Part III, a comprehensive plan for the regulation of water carriers in interstate commerce. Section 307(d) of the Interstate Commerce Act, 54 Stat. 937 [49 U. S. C. § 907(d)], added by the Transportation Act of 1940, is the statutory provision on which the Commission's power to prescribe differentials between all-rail and barge-rail rates is based. This is the first case to reach this Court since the enactment of § 307(d) of the

Interstate Commerce Act which directly involves the power of the Commission to establish joint barge-rail rates and differentials between them and the all-rail rates under that section of the act.

Appellants' complaint charged that the Commission's order rested upon and was vitiated by its misinterpretation and misconstruction of § 307(d) of the act and other statutory provisions. Appellants also charged that the Commission's order deprived them of inherent advantages which, under the national transportation policy, they were entitled to have recognized and preserved.

Appellants believe that the District Court did not fairly attempt to meet the issues raised. Nor do the motions to affirm make any real attempt to answer these contentions. For the most part, these motions are an exposition of the usual thesis of administrative finality: that this is a matter which is left to the discretion of the Interstate Commerce Commission and that, in a record of some 16,000 pages of testimony, there must be some evidence to support the order of the Commission. This Court, however, has always been willing to look behind the smoke-screen of expertise to determine whether an administrative agency erred in applying the law under which it was acting.

The Commission's order establishes new barge-rail rates throughout practically all of the United States east of the Rocky Mountains and vitally affects a large number of carriers and shippers throughout the entire United States. Appellants respectfully submit that the questions raised by this appeal are substantial and should be passed on by this Court only after the fullest consideration.

ARGUMENT.

I.

Whether § 307(d) of the Interstate Commerce Act Is a Congressional Mandate for the Prescription of Differentials Between All-Rail and Barge-Rail Rates Regardless of Relative Cost of Service or Other Transportation Circumstances and Conditions Is a Question of Substance.

A mere reading of the Commission's report, especially the section entitled "THE JUSTIFICATION FOR DIFFERENTIALS —*Congressional policy,*" (270 I. C. C. at 609-613) will make it readily apparent that the Commission construed § 307(d) of the act as a congressional mandate for the prescription of differentials in favor of barge-rail transportation. Furthermore, it is clear that in reaching such a conclusion the Commission was greatly influenced by § 3(c) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 979, and that the Commission completely ignored the provisions of the national transportation policy, 54 Stat. 899.

Appellants contend that there is nothing in § 3(c) of the Inland Waterways Corporation Act which requires the Commission to establish differentials in favor of barge-rail transportation to which it is not entitled on its merits. Furthermore, the Commission in interpreting § 307(d) of the Interstate Commerce Act is required to take into consideration the provisions of the national transportation policy. Appellants contend that lower cost of service and superiority of service are inherent advantages of the rail carriers which, under the doctrine of *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, the Commission is required to recognize and preserve.

Section 307(d) of the act confers on the Commission the power to establish joint barge-rail rates "whenever deemed by it to be necessary or desirable in the public interest, after full hearing . . ." It also provides:

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

This obviously is not an arbitrary direction to prescribe differentials. Congress clearly intended the Commission to exercise discretion in determining when differentials are justified and when they are not, and it intended this discretion to be exercised in accordance with the evidence before the Commission. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it." *Chicago Junction Case,* 264 U. S. 258, 265.

In that part of their motion in which they discuss the legislative history of the Transportation Act of 1940, the barge-line appellees refer to the fact that the Commission considered it its "'duty' to provide differentials unless they were clearly not justified because the proposed routes would be 'unduly circuitous or otherwise uneconomical.'" This confirms appellants' charge that the Commission regarded § 307(d) as a mandate to prescribe differentials. But the act does not read that "the Commission shall prescribe differentials unless shown to be unjustified." It very plainly says that "the Commission shall prescribe such reasonable differentials as it may find to be justified." Before the Commission may prescribe differentials, it must, therefore, have before it evidence from which it can rationally and logically find that differentials are justified. For

the Commission to find that differentials are not justified by demonstrable economies in the barge-rail service and then to prescribe them, without pointing to any evidence which does justify them, is arbitrary action.

The Commission was obviously considerably influenced by § 3(c) of the Inland Waterways Corporation Act which, according to the Commission, declared it to be "the policy of Congress to continue the transportation services of the corporation until among other conditions 'there shall have been published and filed . . . such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers.'" 270 I. C. C. at 610. The Commission then concluded:

> "In the light of legislative history the term 'privileges of joint rail and water transportation' must be understood as referring to barge-and-rail rates lower than all-rail rates." 270 I. C. C. at 610.

Appellants submit that there is nothing in § 3(c) of the Inland Waterways Corporation Act which can possibly be construed as an arbitrary direction to establish differentials in favor of barge-rail transportation. That act specifically provides that such rates shall be reasonably fair to both rail and water carriers. It discloses no intent on the part of Congress to give the water carriers an arbitrary advantage over the rail carriers.

In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, this Court had under consideration § 500 of the Transportation Act of 1920, 41 Stat. 499, which declared it to be "the policy of Congress to promote, encourage, and develop water transportation, . . . and to foster and preserve in full vigor both rail and water transportation." This Court held that this admonition did not mean that the rail carriers were required to maintain

a rate to protect the profits of the water carriers. The Court said that the most this could mean was that there should be "impartial recognition and promotion of the interests of all." 292 U. S. at 288. This same ruling is equally applicable to § 3(c) of the Inland Waterways Corporation Act.

In any event, this question is definitely settled by the national transportation policy, the latest expression of the policy of Congress, wherein it is said:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; . . . ." 54 Stat. 899.

The Commission, however, not only ignored its duty of recognizing and preserving the inherent advantages of all modes of transportation, but specifically rejected appellants' arguments based on the national transportation policy. 270 I. C. C. at 611. It is obvious that the reason it did so was because it believed that to recognize appellants' inherent advantages would be "tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley." 270 I. C. C. at 611. No other conclusion is possible. This important and substantial error of law completely nullifies the Commission's order.

Furthermore, in resting its decision on supposed congressional policy rather than upon the substantive provisions of the Interstate Commerce Act, the Commission committed the same error as it did in making the order which was held invalid by this Court in *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658. There is no substantial difference between that case and this. This was one of appellants' principal

contentions in the District Court but the Court did not discuss this case, and neither motion to affirm attempts to distinguish it although appellants' statement as to jurisdiction again calls attention to the fact that the order here under consideration has the same defects as the order involved in the *Ann Arbor* case.

With reference to this contention, the District Court said:

> "Although the Commission placed great emphasis on what it conceived to be the policy of Congress, it is evident from the report that numerous other factors were given due consideration by the Commission."

Appellants submit that this statement is not in accord with the facts, as a reading of the report will show. It seems plain that the Commission was not prepared to make its order on independent grounds apart from the supposed congressional policy. Cf. *United States* v. *New York Central R. R.*, 263 U. S. 603, 611.

The District Court suggested that the Commission was aware of the inferiority of the barge-rail service. In addition, however, to the fact that the Commission did not give any indication that it considered the differentials justified on such a basis is the fact that, under the national transportation policy, the lower value of the service cannot be regarded as justification for the differentials. This contention of appellants, discussed under point III of this brief, was ignored by the District Court.

It is, therefore, abundantly clear that whether the Commission has properly construed § 307(d) of the act as a congressional mandate for the prescription of differentials between all-rail and barge-rail rates is a question of substance.

II.

Whether, Under the National Transportation Policy, the Commission May Refuse to Recognize Appellants' Inherent Advantage of Lower Cost of Service and Prescribe Differentials in Favor of Barge-Rail Service in Spite of Its Finding That There Are No Demonstrable Economies in Such Service to Justify the Differentials Is a Question of Substance.

Appellants undertook to show before the Commission that the cost of transporting freight via all-rail routes was less than the cost of transporting freight via the corresponding barge-rail routes and that there was no economy in the barge-rail routes which would justify differentials in their favor. Certainly the testimony of one of the Commission's cost experts that "the cost for the joint rail-barge routing is greater than that for the direct all-rail routing" (270 I. C. C. at 604) adds great weight to appellants' contention that they have the advantage of lower cost of service. Appellants contended before the Commission that this lower cost of service was an inherent advantage which, under the national transportation policy and the doctrine of *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, *supra,* the Commission was required to recognize and preserve.

Appellants have never contended or inferred that the Commission made an affirmative finding that all-rail costs are less than barge-rail costs and the validity of appellants' contentions does not rest upon the premise that the Commission did make such a finding.

The validity of appellants' contentions rests upon two simple facts: first, the Commission's finding that

> "In the face of these facts we cannot find that at the present time there are demonstrable economies in

> barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials." 270 I. C. C. at 606

and, second, the finding that the Commission could not accept appellants' argument, based on the national transportation policy, that

> ". . . the rail respondents contend that they should now be found to have an inherent advantage even though the necessary consequence of such a finding would be tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley." 270 I. C. C. at 611.

In this case, the Commission prescribed a system of differentials to prevent the all-rail routes from competing with the barge-rail routes except under a competitive handicap. Its only possible justification for doing so would be to preserve some inherent advantage of the barge lines. But what possible inherent advantage do the barge lines have in this situation? Clearly, they have none. Under such circumstances, it is obviously without legal significance whether the Commission makes an affirmative finding that the all-rail routes have the cost advantage or makes what appellees call a negative finding that the barge-rail routes do not have such an advantage. In either case, for the Commission to give the barge-rail routes a rate advantage over the all-rail routes is arbitrary and without a rational basis. As previously pointed out, the act does not say that the Commission shall prescribe differentials unless shown to be unjustified. It says that "the Commission shall prescribe such reasonable differentials as it may find to be justified."

Furthermore, the refusal of the Commission to recognize appellants' inherent advantage on the ground that it would be tantamount to abrogation of the express policy of

Congress with respect to water transportation, is clearly such a misconstruction and misinterpretation of the law and of the statutory power of the Commission that it completely vitiates the order of the Commission.

The national transportation policy provides that all of the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the declaration of policy. It is just as much a part of § 307(d) of the act as if specifically written therein. That policy cannot be carried out unless the Commission appraises the inherent advantages of the competing modes of transportation and gives effect to their relative costs of service.

In this connection, it is important that the Court bear in mind that this case is not one where the Commission was passing on the reasonableness of a voluntarily established rate. This case involves the power of the Commission to fix a differential between two modes of transportation competing for the same traffic. Cost of service is of far greater significance in the latter case than in the former. When this is borne in mind, it is readily seen that the cases cited by appellees on the significance of cost of service are of little value here. Before the Commission may impose a differential on the all-rail routes it is essential that it find that the differential is justified by some economy in the barge-rail service.

This basic distinction may be shown by reports of the Commission. In *Inland Waterways Corporation* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, 133, the Commission said:

> "It is evident that complainant is under some misapprehension with respect to our duty and authority in establishing new through routes. To permit carriers to maintain for competitive reasons circuitous routes and rates thereover is one thing; but to require them to do so is quite another thing. . . . But here we are

asked, not to refrain from interfering in what connecting carriers wish voluntarily to do for competitive reasons, but to compel an unwilling rail carrier to join in new barge-rail routes which will compete with existing all-rail routes which are amply capable of handling the business. Plainly if we are to accede to such a request, it should appear that the new routes will be reasonably economical."

In the same case, at page 144, the Commission said:

"The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

In *Petroleum and Petroleum Products, Calif. to Ariz.*, 241 I. C. C. 21, 42, the Commission stated:

"The inherent transportation advantage possessed by the rail carriers in transporting petroleum and petroleum products from California to Arizona is the relatively low cost of rail service. The element of cost is not the only factor to be considered in determining the reasonableness of the rate to be charged, but it may become the dominant factor where two different modes of transportation are competing for the same traffic. In such a case the other factors which influence the fixing of rates such as volume of movement, value of service to the shipper, and the value of the commodity carried are of less importance."

These expressions of the Commission show that the late Commissioner Eastman was but stating an obvious truth in his concurring opinion in *Naval Stores From Mississippi to Gulf Ports*, 235 I. C. C. 723, 738, when he said:

"Cost-of-service evidence is essential to determine which form of transportation is economically superior or inferior."

That lower cost of service is an inherent advantage which must be protected seems too clear for argument. Surely, that is what the *Mechling* case means, as pointed out in appellants' statement as to jurisdiction. Appellees' brief reference to the *Mechling* case confirms what appellants had pointed out: that the facts there were different from those in this case but that the principle of that case is applicable here. It is also to be noted that the Court there said:

> "Although barge lines were much slower than railroads, they were less expensive to operate and therefore could afford to transport freight much more cheaply than railroads." 330 U. S. at 570.

For the Commission to establish differentials in favor of the barge-rail service in the face of its finding that there are no demonstrable economies in that service to justify differentials is the clearest sort of violation of the national transportation policy and the principle of the *Mechling* case.

It is clear that the Commission's refusal to recognize appellants' inherent advantage of lower cost of service was not due, as appellees and the District Court suggested, to any belief on the part of the Commission that the cost evidence was stale, but was due, by the Commission's own admission, to its belief that the recognition of such inherent advantage would be tantamount to the abrogation of the express policy of Congress with respect to water transportation. It should be remembered that the Commission was here dealing with relative cost of service and that, as testified by the Commission's cost expert, important factors contributing to the higher barge-rail cost "are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic." 270 I. C. C. at 604. To the extent that the costs

have changed, there is not the slightest reason to believe that the relative positions have changed in favor of the barge lines.

In any event, it was incumbent on the Commission to carry out the national transportation policy and to recognize the inherent advantages of all modes of transportation. Since this was a general investigation instituted on the Commission's own motion, if the Commission considered the evidence as stale or deficient in any respect, then the Commission lacked a proper and rational basis for the entry of its order, and the proper procedure would have been for the Commission to assign the proceeding for further hearing to correct any deficiencies in the record which it believed to exist. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248.

The suggestion of the District Court and appellees that the cost studies of appellants were deficient because based on "average costs" has no place in this proceeding. This same contention was made before the Commission and was not passed on by it because it declined to make a detailed finding as to relative costs. Since the Commission did not pass on this criticism, the District Court should not have done so. The answer to the criticism is, however, that the barge-rail traffic involved moved over all parts of appellants' systems and was handled under all types of transportation conditions. Such use as was made of system averages in developing rail costs was entirely proper and reliable under the circumstances. The system average unit costs referred to are the gross ton mile unit costs for transporting the traffic in line-haul service. It is recognized by all familiar with cost procedures that this unit cost evaluates the influence of transportation conditions as they relate to the varying weights of the loads with varying percentages of empty return and varying length

of haul. This is the unit by which the performance of a given amount of transportation service is most variable, and is the result of dividing the line-haul expenses by the homogeneous assembly of service units—the gross ton mile. The use of this system average unit price, when applied to the number of service units applicable to the rail movement of the joint barge-rail traffic, results in the most accurate determination of costs for the performance of that service that it is possible to secure. Furthermore, the same costs were used in developing both all-rail and barge-rail costs.

It is clear, therefore, that appellants' contention that the Commission must recognize appellants' inherent advantage of lower cost of service raises a question of substance.

III.

Whether the Commission May Deprive Appellants of Their Inherent Advantage of Superiority of Service by Establishing Differentials Based on the Inferiority of the Barge-Rail Service Is a Question of Substance.

The District Court said that the Commission was fully cognizant of the inferiority of the barge-rail service and, in effect, held that differentials might properly be justified by the inferiority of the service. That differentials cannot be justified by the inferiority of the barge-rail service is amply demonstrated by the words of the national transportation policy itself.

Just as lower cost of service is an inherent advantage so likewise is superiority of service an inherent advantage which, under the national transportation policy, the Commission is required to recognize and preserve. To place a competitive handicap in the form of a rate differential on

a superior service is a clear violation of the national transportation policy.

Although the Commission referred to the inferiority of the barge-rail service, it did not indicate that this inferiority furnished any legal basis for differentials. The Commission well knows it does not. In *Rubber Products Between Southern and Ohio Points*, 41 M. C. C. 93, 98, the Commission said:

> "Essentially, the protestants seek an equalization of competition by the imposition of a rate differential on a competing more efficient mode of transportation. Such a request must be denied as inconsistent with the national transportation policy."

Why did the Commission not apply that principle here? Simply because it felt that congressional policy with respect to water transportation compelled it to ignore the requirements of the national transportation policy.

A substantial part of appellants' brief in the District Court was devoted to a showing that the legislative history of the Transportation Act of 1940 clearly indicates that Congress did not intend the water carriers to have any arbitrary advantages over other modes of transportation to which they were not entitled by the economy of their service. Congress inserted in that act many provisions to safeguard every legitimate advantage of the water carriers. It is apparent, however, that Congress intended to protect only those advantages of the water carriers which were inherent in their lower operating costs. The very excerpts from the legislative history of the 1940 act cited in the barge-line appellees' motion confirm this and show how untenable the position of the barge lines is. In the statement of Representative Halleck, cited in their motion, appears the following:

> "As a result the ceiling of rates is fixed by the

railroads. The water carriers operate under that ceiling at a competitive point because their costs are less. This bill recognizes that differential and the reason supporting it.'' 84 Cong. Rec. 9711.

Representative Halleck also referred to language in the bill providing that the Commission should consider

> ". . . the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service."*

The congressional debates show beyond question that Congress meant exactly what it said when it told the Commission to recognize and preserve the inherent advantages of all modes of transportation. This legislative history was ignored by the District Court. Appellants believe that it presents a substantial question which should be fully explored by this Court.

Appellants do not take the position, as suggested by appellees, that the inferiority of the barge-rail service as compared with all-rail service is not legally relevant to the issues in this proceeding. Appellants do not deny that value of service is a factor entering into the reasonableness of a rate, and they do not deny that a carrier may voluntarily establish a rate taking into consideration the value of its service. But in this proceeding where the Commission is fixing a differential between competing modes of transportation, it can give recognition to the lower value of the service only to the extent justified by lower cost.

Under the national transportation policy, the Commission may not prevent a superior service from meeting the competition of an inferior service by establishing a rate

* Compare the language in § 307(f) of the Interstate Commerce Act, 54 Stat. 938, [49 U. S. C. § 907(f)], cited in footnote 4 of the Commission's motion to affirm.

differential based on that inferiority. Therefore, while the inferiority of the barge-rail service is a factor which the Commission may take into consideration in fixing the measure of a differential justified by the economy of the service, the mere inferiority of the service cannot legally be regarded as justification for the differential. To hold otherwise would deprive appellants of one of their inherent advantages.

IV.

Whether the Commission May Establish Joint Barge-Rail Rates Without a Finding That Such Rates Are Just and Reasonable Is a Question of Substance.

The Commission did not find that the joint barge-rail rates which it prescribed were just and reasonable rates. Appellants contend that such a finding is indispensable to the validity of the Commission's order.*

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* The barge-line appellees charge that this contention rests on no allegation in the complaint. It appears, however, that this contention is well within the allegations of paragraph XI of the complaint that "The Commission's order . . . is . . . without support in necessary findings of fact . . ." and within the allegations of paragraph XVIII that "The Commission . . . acted arbitrarily, capriciously, unlawfully, . . . and without support in necessary preliminary findings in making its ultimate findings . . ."

The barge lines' statement that this was not discussed in the District Court is likewise erroneous. On argument before the District Court, counsel for appellants stated as follows:

> "We have taken the position that the Commission cannot prescribe any rates which are less than maximum reasonable rates. The Commission says it can. I think the point is unimportant here for the reason at least the Commission admits the resulting rates have to be just and reasonable rates. But there is no finding, not even an ultimate finding in the Commission's report that the resulting barge-rail rates are just and reasonable rates, and that was one of the factors specifically covered by the Commission's order instituting this investigation.
>
> . . . . . .
>
> "The Commission did not find that the resulting rates

There is no merit to the barge lines' suggestion that to fix reasonable differentials is to fix reasonable rates and that the two cannot be legally distinguished. The Commission did not even purport to test the reasonableness of the differentials by cost of service or any other accepted transportation criteria.* To deduct from existing all-rail rates differentials determined solely on the basis of the lower value of the barge-rail service furnishes no reason at all for assuming that the resulting joint barge-rail rates will return cost plus a reasonable profit, as appellees, including the Commission, well know.

In this connection, a basic inconsistency between the District Court's holding and its reasoning is illustrated by the following statement of the Court:

> "So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the superior service."

Thus, while the Court held that the Commission need not consider relative cost of service, the whole reasoning

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would be just and reasonable, nor did it find that they would be compensatory. They did not find that they reflected any reasonable relation in cost or other justifying circumstances between the all-rail service and barge-rail service and we ask the Court in our suggested findings to find that the Commission has not found the resulting rates were maximum reasonable rates, or not below maximum reasonable rates, and we also request the Court to find that the Commission has not found that the resulting rates would be even just and reasonable." Transcript of proceedings before the three-judge District Court, pages 15, 24-25.

* Commissioner Miller, the author of the Commission's report, in a separate statement on his own behalf said:

> "The differentials approved by this report are, in the final analysis, based largely on judgment and are necessarily more or less arbitrary." 270 I. C. C. at 620.

of the Court rests on the unsupported premise that joint barge-rail rates are fixed somewhere between all-rail rates and barge-rail operating costs. There is no such finding in the Commission's report, and the Court certainly had no basis for making such an unwarranted assumption.

The Commission's report referred to the embargoes placed against this joint traffic by the Mississippi Valley Barge Line Company (270 I.C.C. at 613) and to the substantial operating deficit incurred by the Federal Barge Lines over the years (270 I.C.C. at 595-6). Appellants respectfully submit that, based upon standards usually employed by the Commission for determining the reasonableness of rates, the Commission could not have found that the joint barge-rail rates which it prescribed were just and reasonable. The lack of such a finding cannot be deemed to have been mere oversight on the part of the Commission. The omission of any such finding is quite significant.

V.

Whether the Commission's Order Is Supported by Proper Findings Is a Question of Substance.

The District Court erred in holding that an ultimate finding in the language of the statute authorizing the Commission to enter the order was all that was required in the way of findings to sustain the order. It is now too well settled for argument that an order of an administrative agency must be supported by findings of the basic or essential facts which represent the determination of the agency as to the meaning of the evidence and which indicate that there is some rational or coherent relationship between the basic facts and the ultimate facts. *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 211-12. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S.

499, 504-5, 506, 510-11. *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 463, 464. *Florida* v. *United States*, 282 U. S. 194, 215. *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 554, 559, 560, 561, certiorari denied 305 U. S. 613. *Tri-State Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 564, 566. *Baltimore & O. R. Co.* v. *United States*, 22 F. Supp. 533, 536-7.

All that appellants ask is that the Commission make clear by its findings upon what legal theory it considered the differentials to be justified so that this Court may determine whether such a theory is a proper legal basis under the act for the Commission's order. Obviously, the Commission must indicate the rationale of its decision and must make clear "with a fair degree of assurance, why the Commission acts as it does." *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 212, *supra*. The lack of basic and preliminary findings is convincing proof that the Commission had no real basis for its order in the evidence. Congressional policy was the only basis expressed by the Commission as justification for the differentials. This Court has held that the validity of an administrative order must be tested on the grounds on which it was made. *Securities Commission* v. *Chenery Corp.*, 318 U. S. 80. On such a test, the order lacks the legal and rational basis necessary to support it.

VI.

Whether the Commission's Order Is Supported by Substantial Evidence Is a Question of Substance.

Appellants have never alleged that there is any particular basic finding of the Commission which is not supported by evidence. Appellants simply contend that the Commission's ultimate findings and its order are not

supported by substantial evidence. This is sufficiently evident from the face of the Commission's report as shown by the lack of any findings of the basic facts. The Court is not required to search the record to determine if there is evidence to support the order. It is the duty of the Commission to make it clear by proper basic and preliminary findings that there is a rational basis for the order in the evidence.

Section 307(d) of the act provides that the Commission may prescribe joint barge-rail rates and differentials between them and all-rail rates only after full hearing. What this Court said in the *Chicago Junction Case,* 264 U. S. 258, 264-5, *supra,* is equally pertinent here:

> "Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The barge lines try to dismiss this contention by giving the impression that there must be some evidence in a record of some 16,000 pages and 1500 exhibits which will support the order. But when the Commission specifically excludes any demonstrable economies in the barge-rail service as justification for the differentials and fails to point to any evidence which it does regard as justification for the differentials, appellants submit that a substantial question is raised as to whether the order is supported by the evidence.

CONCLUSION.

The questions raised by this appeal are substantial and important and affect the interests of a large number of shippers and carriers. It is believed that the Court should have the benefit of oral argument and briefs on the merits in this proceeding.

Respectfully submitted,

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APPENDIX.

Interstate Commerce Act, as amended:

NATIONAL TRANSPORTATION POLICY

[54 Stat. 899; preceding 49 U.S.C. § 1.]

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 307(d) [54 Stat. 937; 49 U.S.C. § 907(d).]

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such

carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. . . .

Inland Waterways Corporation Act, as amended by the Denison Act:

Sec. 3(c) [45 Stat. 979; 49 U.S.C. § 153(c)]
It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . .